United States Court of Appeals

for the Second Circuit

APPELLANT'S REPLY BRIEF

77-7236

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

ALBERT A. CORIOU,

Plaintiff-Appellant, Pro Se

-against-

FEDERATION OF THE HANDICAPPED AND DRUG ABUSE CONTROL COMMISSION OF THE STATE OF NEW YORK,

Defendant-Appellees.

CIVIL APPEAL

DOCKET # 77-7236

BRIEF IN REBUTTAL ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

BP/S

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SECOND CIRCUIT

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Preliminary Statement

Preliminary, Plaintiff-Appellant objects to the appearance of Counsel, Assistant Attorney General, Allen S. Moller, without notice at his door to deliver briefs in this matter during the dinner hour on October 24, 1977. Not only is Plaintiff-Appellant having to endure the indignity and hardship of enforced unemployment for a period of over two years by his client but his privacy is violated with impunity by a totally obnoxious and snooping Assistant Attorney General, who having the period from September 19, 1977 to October 24, 1977 to prepare and forward his material would have us believe as the excuse for such intrusion "the failure to reach me by phone". It is inconceivable that such purportedly learned counsel for the Drug Abuse Control Commission of the State of New York would have no knowledge of the availability and use of the mails for such purpose, especially in a matter where the Plaintiff-Appellant's office also happens to be his home which for certain holds no open door for such adversary of the rights of an already disadvantaged Pro Se litigant.

Additionally, Plaintiff-Appellant objects to Counsel's erroneous and idiotic characterizations of his background as "a native American Catholic of French-Canadian extraction". No where in the complaint or subsequent briefs has Appellant ever stated his background as relating to any canadians. How Counsel is able to concoct such totally false and asinine labels for a litigant's background without justification is just as puzzling as his distorted perceptions and characterizations of facts and circumstances presented for arguement in his briefs with irrelevant decisional law in support. Clearly, if he attempted to arrive at valid conclusions through legitimate readings and interpretations of facts and circumstances

rather than indulge himself with false labels and inapplicable decisional law he could have effectively avoided the foregoing criticisms and objections.

Statement of Rebuttal

A. Facts.

Essentially, Appellee's Brief with extensive recitation of decisional law in support is a restatement of the one submitted in justification of his initial motion for dismissal dated February 23, 1977 in which the conspiracy and timeliness issues are the chief matters under consideration.

In general the District Court erred in prematurely dismissing the complaint against the Appellee because of a misapprehension concerning commencement of the running time within which to file such action with the EEOC and it also erred in its failure to consider the facts presented in support of a conspiracy of defendants to deny Appellant his rightful employment, facts which are herein restated for the Court's review and appraisal which are the foundation for the petition for recovery of damages and restraining order.

One of the primary distortions of fact in this matter is to be found in a statement on page 3, Par 2 of Appellee's Brief to the effect that Appellant was notified by Mr. Charles Scheps, Program Coordinator, Federation of the Handicapped, by letter of December 17, 1975 that the subject position had been filled and that he would not be hired.

What Counsel fails to disclose in this regard however is that such lett was an unsolicited rejection (emphasis added) misrepresenting material facts entitling Appellant to challange the validity of an unfavorable employment reference which constituted the true rationale for said rejection not mentioned in the letter.

So we see that very early in the arguement, Counsel begins to present material out of context for the purpose of excluding vital evidentiary matter relating to the conspiracy issue.

In his reference to the proceedings of the New York City Commission on Human Rights, Pages 4 and 5 of the Brief, Three other vital facts are systematically omitted:

1. That pursuant to its determinations after investigation and review a candidate of semitic extraction, to wit Marvin Borenstein, had been selected by the Defendant Federation of the Handicapped from a list of preponderently non-semitic applicants.
2. That the hearing examiner at the fact finding conference refused on request to serve upon Appellant a copy of the disqualifying letter of adverse reference for the first time disclosed as the Defendant Federation's true justifications for the employment rejection.
3. And, that were it not for the exclusionary effect of the letter of adverse reference, Appellant would have been selected over the judaic candidate of secondary qualifications, upon the ground of a vastly superior background and qualifications for the subject position.

Now such circumstances go far beyond mere "vague and conclusory" allegations of a conspiracy as Counsel would pursuade us to believe unless the unsolicited "white lies" characterized by Charles I scheps (Transcript of Deposition dated July 20, 1977, Page 143, Lines 6-9) as the justification for employment exclusion are an ordinary part of perfectly acceptable, supportable and lawful recruiting practices of such agencies supported by Federal Government funds. However, how such policy and practice is consistent with the promotion of equal employment opportunities is an issue that also must be resolved in judicial review.

Now before this Brief in reply proceeds in its rebuttal with respect to the District Court actions and determination and on the points, it is vitally important that this panel be made aware of abuse of discretion in four major areas with regard to Appellant's prior affiliation as employee of the Drug Abuse Commission of the State of New York (hereinafter DACC) which in addition to the conspiracy issue constitute the background and reasons forthis appeal.

1. The failure to be afforded a hearing on charges of alleged unsatisfactory services, pursuant to Section 75 of the Civil Service Law of the State of New York prior to separation from employment although Appellant filed such request during the course of his affiliation as employee of the Appellee.
2. Involuntary separation from said employment without stated reasons in March of 1974.
3. Disqualification from unemployment insurance benefits pursuant to separation on grounds of resignation without good cause.
4. And finally, disqualification from alternative employment for subsequent other reasons not made known prior thereto and not permitted in lawful fashion to be effectively rebutted by Appellant.

Counsel on Page 10, Par 1 of his Brief points out that "as part of the compromise which made passage of the Civil Rights Act of 1964 possible, the aggrieved parties would be required to resort to state procedures,when available, as a condition precedent to private suit in the federal courts" but suppose the available remedy is arbitrarily withdrawn by the operating officials who prefer to terminate the employment without reasons and without a hearing as is the case herein, does that also bar a former employee from initiating further action with regard to future disqualification for alternative employment? If nothing else is accomplished by this appeal an answer to this question is vital to the rights of every single working employee of the State of New York.

For purposes of denial of alternative employment the reasons for separation from state employment are characterized in terms of alleged problems with students and inability to accept proper supervision not disclosed in 1974 but presented in justification for disqualification for alternative employment on February 20, 1976. And for purposes of denying unemployment insurance benefits pursuant to separation, such separation is characterized as a resignation without good cause. Either way, Appellant is devoid of a remedy, yet Counsel Muses rhetorically on Page 17, "where is the wrong". Clearly the wrong lies in the State's initial conspiracy to deny Appellant all of his rights and administrative remedies as an employee and his benefits as an involuntarily separated employee, in addition to his disqualification from alternative employment manifested by collusion with a prospective employer, the Federation of the handicapped, to purposely obscure such disqualification by a statement in a letter of employment rejection that "I should in no way feel my background was lacking in any particular area" (Letter of December 17 1975 referred to in Appellee's Brief, Page 3, Par 2) But Counsel fails to perceive the wrong affirming that Appellant failed to exhaust his administrative remedies and that he failed to demonstrate any overt acts in support of a conspiracy to obstruct his employment. Shall this Appellant or this court be bound by such infirmity and failure of perception?

Statement of Rebuttal

B. District Court Proceedings

In its determination, the District Court confined itself to the narrow issue of the legality, propriety and validity of the subject adverse employment reference alone, notwithstanding Appellant's "preliminary reliance" (Page 6, Par 2, Appellee's Brief) upon it which is all that was available as evidence and known at the time for the purpose of verifying a grievance and commencing an action. Where is it written as Counsel claims on page 7 of his brief that Appellant "rests his entire case upon the adverse recommendation" when the presentation of the entire case has been thwarted and obstructed by premature dismissal of the complaint, the Appellant having been denied the opportunity to challange on the merits, the State as a properly charged party, with regard to the letter and all of the facts and circumstances surrounding it?

Appellant has never argued that the adverse employment reference per se is conclusive of actionable wrong as stated on page 7 of Appellee's brief. It is the invidious injection as a justification for for employment rejection at a fact finding conference pursuant to Defendant Federation's affirmation of "nothing of an adverse nature lacking in his background" which constitutes preliminary reliance of actionable wrong. It is also the refusal to serve a copy at the hearing for purposes of rebuttal which is wrongful and which was not taken into consideration in the determination of the District Court although all such facts and circumstances were clearly articulated in preliminary briefs, to wit: ROA, Document I, page 2, Item 9-D, ROA, Document V, Page 3, Par 2, ROA, Document XIII, Page 2, Par 3, ROA, Document , Memorandum of Objection and Petition for Reversal of Order Dated May 10, 1977, Page 1, Par 2 and 3, Page 1 and 2, Par 7.

There is no document about an employee or prior employee issued by any agency of the Local, State or Federal Government which affects his livlihood or any other benefit status which that employee is legally barred by law from disclosure and certainly there is no law which permits an employer, funded by the Federal Government, to systematically lie, as the Defendant Federation of the Handicapped did by admission, about the exclusionary effects of such a document upon his candidacy for employment, so as to deny the right of effective rebuttal. These acts go to the very heart of the conspiracy argue-

ment.

Moreover, assuming the letter per se is incompetent, wrongful, inflammatory, prejudicial, damaging, unwarranted and malicious as a valid appraisal of Appellant's affiliation as employee of the DACC for purposes of relocation to alternative employment, such information was not made known to him at the time of his separation from State employment in March of 1974 and he is entitled to a legal opportunity to defend his allegations against the DACC in connection therewith as a properly charged party.

If the Appellee is indeed innocent as claimed of any wrong doing, he is not deprived of procedural or other safeguards as a properly charged party. In point of fact he is afforded the full protections of law and is moreover at liberty to vindicate himself in the course of trial or other legal proceeding with the same effect as the premature determination to dismiss. He may also invoke his further rights as an Appellant and even his 11th Amendment rights, however he is not entitled to be prematurely exonerated without due process, as if a State agency could do no wrong, as the determination of the lower court has improperly concluded.

So the "entire case" to which Counsel refers is far from presented including the facts and circumstances surrounding the letter and Counsel distorts Appellant's arguement of a conspiracy supported by the existence of the letter alone for his own convenience unrelated to the merits and unrelated to the substantive issues. Such distorted reading of the foregoing arguements and failure to be afforded the right of effective rebuttal by trial or other legal proceeding are not binding either on this Appellant or Court and do not justify the findings of the lower court in this matter.

REBUTTAL POINT I

PLAINTIFF-APPELLANT OBTAINED COURT JURISDICTION BY ORDER OF THE JUSTICE DEPARTMENT PURSUANT TO TIMELY FILING OF A COMPLAINT BEFORE THE EEOC ON SERVICE OF AN ADVERSE EMPLOYMENT REFERENCE. THE ONLY JUSTIFICATION FOR DEFENDANT-APPELLEE'S CLAIM THAT IT WAS NEVER CHARGED IS THE DISTRICT COURT'S PREMATURE AND ARBITRARY DISMISSAL OF THE COMPLAINT.

Appellant has been sustained in his right to sue pursuant to notification of the United States Justice Department in this regard as a consequence of proper and timely charge filed on May 17, 1977, well within the 300 day limitation of service upon him of an adverse employment reference on April 7, 1977 (ROA, Document IX) How is it that the lower court in all of its presumed wisdom failed to perceive on May 3, 1977, the date of its determination to dismiss the complaint, what the Justice Department clearly and properly understood to be the initial running time within which to bring an action before EEOC on April 7, 1977, the date of service of the adverse employment reference, and properly reserve decision to afford Appellant his full running time within which to file?

Such infirmities of the lower court can hardly be binding on an Appellant who merely seeks his constitutional protection of a fundamental property right, to wit, the right of a livlihood, systematically obstructed by his adversaries.

But what is even a more egregious failure of the lower court in this regard is its failure to reinstate the Appellee as a party to the action after 4 months of a notice of motion filed on July 26, 1977, pursuant to Notice of Right to Sue of the Justice Department on July 22, 1977 which in effect also makes this an appeal from a non-determination and judicial dereliction of duty.

Thus Counsel has indulged himself in a futile counterproductive exercise in attempting to establish that Appellant "completely bypassed the EEOC conciliatory mechanisms as they pertain to the Appellee". Appellant has shown that on both procedural and substantive grounds he has the right to sue the Appellee, arbitrarily denied to him by the premature dismissal of the District Court, and reinstatement as a party to the action is in complete conformity with the authority of the United States Justice Department, which thoroughly understands the language and legislative history of Title VII procedures in addition to the unique and factual circumstances of this entire matter.

REBUTTAL POINT II

THE ALLEGED ACT OF DISCRIMINATION OCCURRED AT THE TIME PLAINTIFF-APPELLANT WAS SERVED ON LEGAL DEMAND BY NOTICE TO PRODUCE WITH AN ADVERSE EMPLOYMENT REFERENCE CONSTITUTING DISCRIMINATION OF A CONTINUING NATURE PROHIBITED BY LAW AND AS SUCH HIS ACTION IN FEDERAL COURT WAS TIMELY AND LEGITIMATE

Counsel asks on Page 14, Par 3 of his Brief: "Did Plaintiff-Appellant meet the 300 day limitation within which to sue a party under Title VII in District Court" and confidently answers his own question: "Clearly not, ..." relying on the effective date of separation from Appellee's employ on March 27, 1974 as "the only alleged act if any" which ever occurred. It has already been pointed out that the letter of employment termination attached to the complaint contains no reasons for said termination other than to confirm the last day of employment and needless to say no preliminary indication of a bar to future employment. Moreover that letter does not even originate from the same operating official who disqualified Appellant from alternative employment in February of 1976.

It has also been pointed out that the former employer withdrew state remedy for Appellant's opposition to proposed unsatisfactory performance rating substituting termination from employment without reasons in 1974.

Since he was barred from his only available administrative remedy by his supervisor, Appellant had no choice but to opt elswhere for more tolerable employment which has since been prohibited by Appellee's insistence upon disqualification therefor.

Appellant was only at liberty to initiate a valid complaint when an overt cause of action was first made known, namely in December of 1975, at which time he was disqualified from employment with the Defendant Federation of the Handicapped for the patently absurd reason advanced that "there was nothing in any particular area lacking in his background". The true and more complete disclosures in this regard were later made known on February 23, 1977 and April 7, 1977 the respective dates of fact finding conference before the New York City Commission on Human Rights and subsequent service on legal demand of the letter of adverse employment reference by Defendant Federation of the Handicapped pursuant to action in District Court.

In this regard Counsel admits that even when there is only one such act of continuous discrimination, the time begins at the time of occurrence (Page 15, Appellee's Brief) How then does he properly refute the validity of motion for reinstatement 4 days pursuant to Notice of Right to Sue of the Justice Department predicated on timely action filed before EEOC on May 17, 1977, 40 days after service of the adverse reference on April 7, 1977 and well within the 300 day specified statute of limitations?

So continuing violation, albeit one instance thereof but perhaps others, is the issue which Counsel misses in his "time barred" arguement. So does he and the lower court miss the significance of Defendant's voluntary injection as a party to the action by letter of adverse reference solicited by his co-conspirator, the Defendant Federation of the Handicapped for the purpose of denying Appellant his rightful employment and justifying same to the New York City Commission on Human Rights. Such voluntary complaince with a co-conspirator is hardly akin to "seeking a new affirmation from the alleged offending employer" (Memorandum of the District Court determination to dismiss, Page 3) and is a misapplication of decisional law in the matter of National Labor Relations Board V. Childs Co. It is simply a matter of the agreement of two parties to improperly deny the Appellant his livlihood and to hold it confidential by fraud until it became necessary to justify it to the agency investigating the complaint at which time the Defendant Federation of the Handicapped had no other alternative but to document the deceptions heretofore held secret to the detriment of the Appellant.

Inasmuchas Appellant has obtained court jurisdiction over Appellee by the United States Justice Department, pursuant to proper and timely filing of a complaint with EEOC, there is no justification whatever for Counsel's erroneous conclusion that "Plaintiff-Appellant fails in his attempts to obtain jurisdiction over Defendant-Appellee" and as for citing the Child's case in support, it is not only inapplicable but stale and irrelevant.

REBUTTAL POINT III

THE CHARGES IN THE PRO SE COMPLAINT ARE WELL DOCUMENTED AND CONTAIN CLEAR, COGENT AND COMPELLING GROUNDS IN SUPPORT OF A CONSPIRACY OF DEFENDANTS TO DEPRIVE PLAINTIFF-APPELLANT OF HIS CIVIL RIGHTS FOR WHICH RELIEF IN COSTS AND DAMAGES IS FULLY JUSTIFIED.

Appellee voluntarily (emphasis added) injected himself into the "fray? He had no obligation or State mandate to do so. Even the telephonic communications of adverse reference were not sufficient to draw him into the fray. However so eager was he to document his condemnation of Appellant's work history in writing without reservation, so confident of the unqualified protections of the 11th amendment which immune the states from legal reprisals for actionable wrong, and so methodical was his co-conspirator in concealing that condemnation in innocuous written language of rejection, that no thought whatever was given to the possible legal consequences thereof. In this regard, is such a conspiracy of arrogance and flagrant disregard for law ever "evident on the face" as District Judge Frankel attempts to advance in support of his dismissal of the complaint? His vision of the circumstances, if indeed he perceives any, is certainly contrived and distorted at best and subject to correction by action of this court.

In point of fact it could be said that Appellee invited the instant litigation by such action, but Counsel simply regards all of this as so much mere"grasping for straws". However grasping for straws as Counsel should be aware is the definition of the preoccupation with defending a disreputable client totally devoid of any credible defense.

As a pertinent case in point and evidence of incontroverted Jewish conspiracy to deprive this Appellant, a devout American Roman Catholic of French extraction, of his constitutionally protected property right to a livlihood in employment for which he was and is well qualified, the New York City Commission on Human Rights has determined, pursuant to investigation and review in this matter, that a candidate of Semitic extraction, of secondary qualifications, to wit, Marvin Borenstein had been selected by the Defendant Federation of the Handicapped over the candidate of primary qualifications, Albert

A. Corion from a list of preponderently non-Semitic applicants, a most disgraceful and inexcusable breach of the anti-discrimination laws of this country.

Where then does Counsel derive his assertions and affirmations of"no existing facts" in this regard? And, moreover, how does such an agency arrive at a legitimate determination of "no probable cause" and still claim to be an advocate of human rights?

How does he properly conclude "no intentional and purposeful deprivation of constitutional rights" when this is clearly a case of involuntary separation from State employment without stated reasons in violation of Section 75 of the Civil Service Law of the State of New York, entitling an employee thereof the right to a hearing prior thereto, with subsequent disqualification from alternative employment for reasons only disclosed by virtue of the instant litigation?

While it may not be unlawful Per Se for a prior employer to communicate to a prospective employer about an applicant, it is to be sure prejudicial, damaging and insidious for such prior employer to privately disqualify the Applicant by adverse reference and arrange to conceal the true reasons or rationale underlying the disqualification for purposes of protecting the offender against litigation. It is moreover unlawful to lie, and I may add lie by admission, that the Applicant was rejected for reasons other than the reasons advanced in the letter of adverse reference at issue, as the initial complaint states.

Additionally, while it is true that Appellant had full knowledge that the prior employer would be contacted as is customary by the prospective employer, there is no reason why the Applicant should apprehend in advance of such customary identification of prior employer that that employer would be so malicious and idiotic as to disqualify him from further livlihood simply because he has been so identified, especially when no reasons were given for termination from State employment in 1974 which relate to the reasons for employment disqualification in February of April of 1976.

Of course Counsel will plead "naked assertions" of a conspiracy until he examines the testimony in deposition of the Defendant Federation of the Handicapped admitting to the lies advanced with

regard to willful and purposeful intent to deceive Appellant and deprive him of his right to challange the veracity and credibility of adverse appraisals of his employment history (Transcript of Deposition of July 20, 1977, Page 143, Lines 6-9) Should he then fail to see "the wrong" with regard to the conspiracy issue he is at liberty to retreat again to his law books or better yet seek professional remedy for his infirmities. In either case this Appellant will go the full legal route to protect his constitutionally guaranteed property right to a livlihood which he and his despicable and disreputable client labor so assiduously to strike dead.

Conclusions and Motion

1. WHEREAS: Appellee's Brief contains fundamental errors and omissions of fact and circumstances supported with inapplicable and irrelevant decisional law which do not warrant the conclusion to affirm the order of the District Court,
2. WHEREAS: Appellant has satisfied all procedural and substantive requirements for a Title VII action with proper charge before EEOC and has obtained Court jurisdiction by authority of the United States Department of Justice over Defendant DACC,
3. WHEREAS: The arguement of naked assertions and vague and conclusory allegations has been refuted with willful, intentional and purposeful deprivation of a constitutionally protected property right fully established,
4. WHEREAS: Plaintiff-Appellant is entitled to discredit the disqualifying letter of adverse reference and all of the background thereof in litigation against a properly charged party,
5. WHEREAS: The order of the District Court dismissing the complaint against DACC was premature, unwarranted and improper,
6. AND, WHEREAS: The conspiracy assertions are fully justified upon all of the foregoing grounds and arguements as set forth in the reply Brief,

   APPELLANT HEREIN, moves for order reversing the determination to dismiss and for reinstatement forthwith of the DACC as a properly charged party to the action.

Dated: Jackson Heights
New York
November 18, 1977

Respectfully Submitted,

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AFFIDAVIT OF SERVICE

I, ALBERT A CORIOU, Plaintiff-Appellant Pro Se in this action of the foregoing address, declare under the penalties of law that I have served copies of the within Brief in Rebuttal on Appeal from the United States District Court for the Southern District of New York, by depositing same, properly enclosed in a post paid wrapper by certified mail, with the Post Office located at 33-23 Junction Boulevard, Corona New York 11368, directed to the Attorneys for the Defendants and Appell ees, at the respective addresses indicated within the State designated by them for that purpose or place where they kept an office, between which places there then was and now is a regular communication by mail.

ATTEST

Albert A Coriou

SIGNATURE OF SERVER
Date: November 18, 1977